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NO. ~~A-454~~

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHARLES WILLIAM BASS,

Petitioner

vs.

THE STATE OF TEXAS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE COURT OF CRIMINAL APPEALS OF TEXAS

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition was this ____ day of January, 1982, mailed to Hon. Miron A. Love, Harris County District Court, Harris County, Texas; Hon. Bert Graham and Hon. John S. Holleman, Assistant District Attorneys, Harris County Courthouse, Houston, Texas.

Robert E. Sanders

Jack G. Brown

QUESTIONS PRESENTED

1. Whether Petitioner was denied his right to effective counsel in this capital case, guaranteed by the Sixth, Eighth and Fourteenth Amendments, when the Trial Court denied Petitioner's Motions to remove court-appointed counsel and to grant a continuance designed to give retained counsel time to prepare for trial, thereby forcing Petitioner to face the capital offense with counsel he could not work with or trust.

2. Whether the Trial Court's error in admitting evidence of an extraneous offense during the guilt and innocence stage of the trial to prove identity violated Petitioner's right to fair trial and due process under the Fourteenth Amendment.

3. Whether the Trial Court's action in proceeding to trial with Marilyn Janet Turner as a juror after she informed the Court that as a result of a narrow escape from her own murder created prejudice and bias in her attitude; thereby depriving Petitioner of his right to a fair trial by a jury unbiased and unprejudiced.

4. Whether the Trial Court's exclusion of prospective juror Marian Hall was improper under the rationale of Adams v. Texas, 448 U.S. 38 (1980) and Witherspoon v. Illinois, 391 U.S. 510 (1968); thereby depriving Petitioner to his right to a fair trial by a jury unbiased and unprejudiced.

5. Whether the Trial Court's exclusion of prospective juror Mildred Spensley was improper under the rationale of Adams v. Texas, 448 U.S. 38 (1980) and Witherspoon v. Illinois, 391 U.S. 510 (1968) and thereby deprived Petitioner of his right to a fair trial by a jury unbiased and unprejudiced.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHARLES WILLIAM BASS,

Petitioner

vs.

THE STATE OF TEXAS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner Charles William Bass respectfully prays that a Writ of Certiorari issue to review the Judgment of the Texas Court of Criminal Appeals in this case.

Citation to Opinion Below

The majority opinion of the Texas Court of Criminal Appeals is attached hereto as Appendix A.

Jurisdiction

The Judgment of the Texas Court of Criminal Appeals was entered on September 23, 1981. A timely Petition for rehearing was denied on October 28, 1981. On November 25, 1981, Justice White issued an Order staying the sentence of execution pending filing of Petition for Writ of Certiorari with this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), Petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner's first federal question was raised by Robert E. Sanders, Amicus Curiae, in his Motion for reconsideration of appeal filed with the Texas Court of Criminal Appeals on October 8, 1981. The Brief filed by the Amicus Curiae addressed the question of whether the denial by the Trial Court to grant Petitioner's Pro Se Motion seeking removal of appointed counsel and continuance to allow retained counsel to prepare for trial deprived Petitioner of his constitutional right to have the effective assistance of counsel. The Court of Criminal Appeals of Texas never addressed this issue at any time. See Amicus Curiae Brief attached hereto as Appendix B.

2. Petitioner urged that the admission of evidence of an extraneous criminal offense during the guilt and innocence stage of the trial to prove identity deprived him of a fair trial and due process guaranteed by the United States Constitution. Petitioner's counsel contended such admission was reversible error in Ground of Error number 4. See Petitioner's Appellate Brief pp. 16-20, here attached as Appendix C. The Texas Court of Criminal Appeals agreed this was error, but found that the error was harmless. See Appendix A pp. 3-4.

3. Petitioner urged that the conviction rendered be reversed because of the Trial Court's ruling requiring Marilyn Janet Turner to serve as a juror after being subjected to a life threatening situation which created a prejudice and bias in her attitude. See Appellate Brief in Court of Criminal Appeals at pp. 10-13 attached as Appendix C. Petitioner complained of Trial Court's action as stated above and while not specifically stated in due process language, it clearly reflects a due process complaint. The Texas Court of Criminal Appeals overruled Petitioner's contention of error. See Appendix A, pp. 5-7.

4. Petitioner stated that exclusion of prospective

juror Marian Hall was improper under the rationale of Adams v. Texas, 448 U.S. 38 (1980) and Witherspoon v. Illinois, 391 U.S. 510 (1968). See Appellate Brief, pp. 21-23. Petitioner complained of Trial Court's action as stated above and while not specifically stated in due process language, it clearly reflects a due process complaint. The Texas Court of Criminal Appeals overruled Petitioner's argument. See Appendix A, p. 12.

5. Petitioner stated that exclusion of prospective juror Mildred Spensley was improper under the rationale of Adams v. Texas, 448 U.S. 38 (1980) and Witherspoon v. Illinois, 391 U.S. 510 (1968). See Appellate Brief pp. 22-23. Petitioner complained of Trial Court's action as stated above and while not specifically stated in due process language, it clearly reflects a due process complaint. The Texas Court of Criminal Appeals overruled Petitioner's argument. See Appendix A, pp. 12-13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This cause involves the Sixth Amendment to the Constitution of the United States, which provides in the relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

2. This cause involves the Fourteenth Amendment to the Constitution of the United States, which provides in the relevant parts:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law."

3. This cause involves the following Sections of the Texas Criminal Code:

> Article 36.29 V.A.C.C.P. which provides:
>
> "Not less than twelve jurors can render and return a verdict in a felony case. It must be concurred in by each juror and signed by the foreman; provided, however, when pending the trial of any felony case, one juror may die or be disabled from sitting at any time before the charge of the Court read to the jury, the remainder of the jury shall have the power to render the verdict; but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it."

Texas Penal Code Section 12.31(b)

STATEMENT OF THE CASE

On August 16, 1979, Charles William Bass was walking slowly down a lonely dark street in Houston, Texas. (R. 2646). Two Houston City Marshalls were cruising on that same street. (R. 2468). City Marshalls are employed by the Municipal Courts in Houston to serve misdemeanor warrants: simple assault, traffic violations, traffic tickets and Class C misdemeanors. (R. 2470). On the night in question, Officers Charles Baker and R. A. McCammon were searching for an individual, Gregory Webb, pursuant to a warrant issued by the Municiapl Court. (R. 2470). Mr. Webb was charged with the offense of driving with no operator's license. (R. 2470). Officer Baker had arrested Mr. Webb on an occasion prior to August 16, 1979. At approximately 9:15 p.m., the two officers observed the Petitioner walking down this Houston street. (R. 2471).

The two officers stopped their cruiser and ordered the Petitioner to approach the automobile. (R. 2473). The Petitioner complied with this instruction. Officer Baker began to interrogate the Petitioner. (R. 2474). Upon discovering that Petitioner had no identification, the officers exited from their cruiser and began to conduct serious investigation for no apparent reason. Officer R. A. McCammon conducted an extensive search of the person of the Petitioner for, again, no apparent reason. (R. 2649). At this time, Officer R. A. McCammon discovered rolled coins in the Petitioner's pockets.

With the discovery of the coins, the action of the police officers became now physical in nature. Officer McCammon stated that "This little bastard has just ripped somebody off, let's whip his ass and find out who!". The Petitioner was thrown to the hood of the car and Officer Baker grabbed his arm and held him. (R. 2649-50). At this point, the Petitioner pulled a gun that he was carrying out and shot Officer Baker in what he believed was self

defense. (R. 2650). The Petitioner had been exposed to police brutality on numerous occasions, and therefore when placed in danger on August 16, 1979, of another physical assault by a police officer, he defended himself.

Officer McCammon fired shots at the Petitioner, striking him once in the leg, before the Petitioner fled into the night. (R. 2616). The Petitioner's flight brought him to Covington, Kentucky. (R. 2653). On August 20, 1979, the Petitioner was arrested in Covington, Kentucky. (R. 2653). The Petitioner, having been before the Texas judicial system on prior occasions, and fearing for his life and safety, fought extradiction in the Courts of Kentucky. After a battle of nearly six months, the Petitioner was returned to Texas in January, 1980, to face the charge of capital murder.

The Petitioner was arraigned on February 28, 1980, in Houston, Texas. (R. 10). At that time, the Court appointed Mr. Victor Blaine to defend the Petitioner; as the Petitioner was an indigent and unable to provide his own legal counsel. The trial date of April 22, 1980, was set by the Court in March of 1980.

Communications between the Petitioner and his appointed counsel began to deteriorate rapidly. The Petitioner sought legal assistance from other sources. The Petitioner lacked confidence in his appointed counsel and, in fact, felt no effective attorney-client relationship could exist between the Petitioner and Mr. Blaine. After nearly a month of pleas to various legal groups such as the Southern Poverty Law Center, the Petitioner finally was able to secure legal counsel of his own choosing. The Petitioner tendered Motions Pro Se to the Court requesting that a continuance be granted and appointed counsel be removed.

On April 17, 1980, the case came before Judge Miron A. Love of 177th District Court in Harris County, Texas,

for a hearing on the Motions filed by the Petitioner. (R. 3). The State of Texas was represented by the Honorable Bert Graham, Assistant District Attorney for Harris County. (R. 4). The Petitioner appeared in person and was also represented by court-appointed counsel, Mr. Victor Blaine. Mr. Robert E. Sanders, a licensed attorney in the Commonwealth of Kentucky and the State of Ohio, appeared as a friend of the Court. (R. 3). On this day, the Petitioner requested that appointed counsel be withdrawn as his legal representative. (R. 4). The Petitioner tendered two Motions, Pro Se, to the Court which sought two things: the removal of Mr. Blaine as trial counsel and a reasonable continuance for newly employed counsel to prepare Petitioner's defense. (R. 4).

The Petitioner and the friend of the Court, Mr. Robert E. Sanders, informed the Court that Mr. Morris Dees and Mr. John Carroll of Montgomery, Alabama, Mr. David Bires of Houston, Texas, and Mr. Sanders himself, had agreed to represent the Petitioner in this capital offense. (R. 7). The Petitioner was unable to secure the help of these superb legal counsels until just prior to April 17, 1980. This indigent was being afforded the opportunity to have the most able representation that could be found.

The Court refused to consider the Motions tendered by the Petitioner unless Mr. Blaine adopted the Motions as his own. (R. 4). The Court stated flatly that it would not allow an attorney that was appointed and assigned by the Court to a particular case to withdraw or be removed unless the attorney advised the Court personally that some conflict of interest existed or the attorney was unable to proceed in the best interests of the defendant represented. (R. 4-5). Furthermore, the Trial Court stated it would not dismiss appointed counsel, Victor Blaine, because the Court knew that Mr. Blaine was competent to represent this Petitioner or any other defendant charged with a serious criminal

offense. (R. 5). Mr. Blaine refused to adopt the Motions of the Petitioner as his own.

The trial date of April 22, 1980, was the first setting of this case for trial. (R. 8). Neither the State nor the Petitioner had sought any continuances in this matter. (R. 8). The Petitioner brought his Motion for continuance five days before the trial setting because he had been unable before that date to obtain representation of his own choosing until that time. (R. 8-11).

The Petitioner informed the Court that a continuance was necessary to allow newly employed counsel an opportunity to prepare his defense and to conclude major litigation they were engaged in at that time. Mr. Dees and Mr. Carroll are both employed by the Southern Poverty Law Center. Each was engaged in litigation which prevented them from assisting Petitioner unless a continuance was granted. (R. 12). Each of the counsel engaged felt necessary delay was required to adequately investigate and prepare for trial. (R. 12).

The Petitioner, Charles William Bass, did not desire the services of Blaine and voiced that opinion to the Trial Court as soon as he was secure in that knowledge that the named attorneys would assist him. (R. 13). The Motion for Mr. Blaine to be removed and a continuance granted was made by the Petitioner two days after he was made aware of their offer to assist and provide legal representation to him.

On April 17, 1980, the Trial Judge Miron A. Love denied the Petitioner's Motions and forced the Petitioner to trial with appointed counsel, thereby preventing him from being represented by counsel of his own choosing. (R. 4-15). After a trial with appointed counsel, the Petitioner was found guilty at the conclusion of the penalty phase of the trial, sentenced to death.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE COUNSEL AS GUARANTEED BY THE SIXTH AND THE FOURTEENTH AMENDMENTS BY TRIAL COURT'S DENIAL OF MOTION TO REMOVE COURT APPOINTED COUNSEL AND TO GRANT A CONTINUANCE TO ALLOW RETAINED COUNSEL THE OPPORTUNITY TO PREPARE FOR TRIAL.

Petitioner was able for the first time to retain counsel five days before his capital case was set for trial. He moved the Court requesting removal of appointed counsel and a continuance to allow his retained counsel time to prepare for his defense. The newly retained counsel needed time to properly investigate the facts surrounding the event and to prepare the proper legal arguments necessary in a complex capital case.

This Court has long held that the right to counsel guaranteed by the Sixth Amendment to the United States Constitution and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution are not satisfied by mere pro forma assistance of counsel. The right to counsel is an essential and vital component of due process which can be traced to Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). The Sixth and Fourteenth Amendments mandate a substantive guarantee of effective representation. Avery v. Alabama, 308 U.S. 444, 446 (1940). "The fundamental right to counsel is only satisfied when the Courts' deem the assistance of counsel meets the standard of effective assistance of counsel." Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972). One of the prerequisites of effective assistance of counsel is the requirement that the defendant be able to assist in his own defense. See United States ex. rel. Carey v. Rundie, 409 Fed.2nd 1210, 1212-15 (3rdCir. 1969), cert denied, 397 U.S. 949 (1970).

The right to effective assistance of counsel would mean little unless the defendant was given the reasonable

opportunity to employ and consult with counsel. See Chandler v. Fretag, 348 U.S. 3 (1954).

The right to have assistance of counsel has been extended to allow the defendant the opportunity to obtain counsel of his choice to prepare and conduct his defense. Gandy v. State of Alabama, 569 Fed.2nd 1318 (5thCir. 1978). "The right to counsel is a basic right, and the ability to choose one's own counsel is a vital element in the exercise of this right." Cleveland v. United States, 322 Fed.2nd 401, 402 (D.C.Cir. 1963). The right to have the assistance of counsel includes the right to select one's own counsel. See U.S. v. Liddy, 348 Fed.Supp. 198 (D.C.Dis. 1972); United States ex. rel. O'Neill v. Rundle, 230 Fed.Supp. 323 (E.D.PA. 1964), affirmed, 341 Fed.2nd 303, (3rdCir. 1965), cert denied, 381 U.S. 944 (1965); Mulkovich v. State, 243 N.W.2nd 198 (Wis. 1976); People v. Jeffrey, 418 N.E.2nd 880 (Ill. App. 1981); People v. Thompson, 416 N.E.2nd 1105 (Ill. App. 1981); People v. Green, 248 N.E.2nd 116 (Ill. 1969). This Court expressly addressed this issue. In Crooker v. California, the Court ruled the right to have the assistance of counsel when confronted with criminal charges includes the essential element of choosing counsel of one's own preference. 357 U.S. 433 (1958); Powell v. Alabama, supra at 45.

In the case at bar, the Petitioner was an indigent. The Trial Court appointed an attorney to represent him. Communications between the Petitioner and his court-appointed attorney broke down. (R. 6). The Petitioner was unable, because of his poverty, to obtain legal assistance other than the aforementioned appointed counsel until shortly before the trial date. (R. 6-7). Shortly before the trial setting, the Petitioner was able to obtain counsel of his own choosing; therefore, he properly tendered a Motion Pro Se to have appointed counsel removed and a continuance granted to allow newly retained counsel the opportunity to adequately prepare his defense. Petitioner sought to have his appointed counsel

removed five days before the case was set for trial. When irreconcilable differences have caused the attorney-client relationship to break down, various courts have allowed the defendant to replace and remove his appointed counsel shortly before a trial date was reached. State v. George, 414 P.2nd 730 (Ariz. 1966); People v. Williams, 194 N.W.2nd 337 (Mich 1972). The right to have counsel of one's own choosing is not absolute. The exercise of this right guaranteed by the due process clause of the Fourteenth Amendment must be counterbalanced against the Court's interest in the orderly administration of justice. See United States v. Upton, 531 Fed.2nd 1281 (5thCir. 1976). A Court confronted with the decision of whether to grant a continuance to allow a defendant to remove his counsel should consider certain important factors such as the length of the requested delay; whether any continuances have been previously granted; whether delay sought is for a legitimate reason, or whether it is dilitory and contrived; and the affect the continuance would have on the litigants, witnesses, respective counsel and the Court. See Giacalone v. Lucas, 445 Fed.2nd 1238 (6thCir. 1971), cert denied, 405 U.S. 922 (1972). If the factors set forth by the Sixth Circuit Court of Appeals in Giacalone v. Lucas are followed in the present case, the right of the Petitioner to select counsel of his own choosing seems clearly to outweigh the Court's interest in the orderly administration of justice. The Petitioner sought a delay of approximately three months for a trial which had been set only two months earlier. Neither the Petitioner nor the State had requested any continuances in this capital case. (R. 8). The reason the Petitioner requested the delay was because he felt he could not assist the appointed counsel with his defense. Irreconcilable differences had erupted between the Petitioner and his attorney. (R. 6-7). Petitioner did not seek the change prior to April 17, 1980, because he was an indigent and unable to obtain counsel of his own choosing until the Southern Poverty Law

Center and other interested attorneys decided to offer their assistance to his worthy cause. (R. 12).

The prosecution voiced objection to the continuance stating that two potential witnesses had already died prior to trial. (R. 9). However, the Petitioner should not and cannot be penalized for these events for which he had no control and which had in fact already occurred regardless of the Court's ruling on his Motion for continuance. The defendant's right to be represented by counsel of his own choosing must not be abridged simply because of inconvenience to the prosecution. See Patton v. State of North Carolina, 315 Fed.2nd 643 (4thCir. 1963); U.S. v. Bentoena, 319 Fed.2nd 1916 (2ndCir. 1963), cert denied, 375 U.S. 940 (1963). The Trial Court refused to grant the Petitioner's request to remove appointed counsel because the Trial Judge had assigned counsel to the case and stated that he knew personally that appointed counsel "... was competent to represent the Appellant or any other defendant charged with a serious criminal offense". (R. 5). The right to counsel of one's own choosing does not revolve around whether appointed counsel was competent, but whether or not the defendant has the opportunity to select counsel of his own choosing. See Galssen v. United States, 315 U.S. 60 (1942); United States v. Johnson, 318 Fed.2nd 288 (6thCir. 1963); Gatsen v. United States, 223 Fed.2nd 627 (D.C.Cir. 1955). The fact that appointed counsel was adequate to defend the Petitioner does not override Petitioner's right to be represented by counsel of his own choosing. The Court was made aware of the differences between the appointed counsel and Petitioner; yet elected to proceed without investigating into the alleged differences. The fact that the Petitioner did not seek to remove counsel until five days before the trial date had arrived should not outweigh his right to select counsel of his own choosing. In United States ex. rel. Carey v. Rundie, supra at 1215, a continuance was granted on the date of the trial to allow the defendant to obtain counsel of his own choosing. In Patton v.

North Carolina, supra, stated that the fact the defendant had not sought or requested any prior continuances should be weighed heavily in his favor in determining whether the Trial Court abused its discretion in not granting a continuance to allow for a change of counsel. Id. In Patton v. North Carolina, supra, Appellant therein requested a continuance five days prior to the date set for trial. The Appellant had not sought or been granted any prior continuances; and the Trial Court's denial of his request for continuance was deemed to be an abuse of discretion. "To compel one charged with a grievious crime to undergo a trial with the assistance of counsel with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of counsel whatsoever." Brown v. Graven, 424 Fed.2nd 1166, 1170 (4thCir. 1970). In Brown, the Circuit Court of Appeals stated that any Trial Court confronted with this problem of a breakdown in communication should conduct a serious investigation into the basis of such claim. Id. In the case at bar, the Trial Judge was confronted with such a claim. (R. 5). However, the Court when confronted with this problem did not investigate into the basis of the discord between the Petitioner and appointed counsel. Effective assistance of counsel, perhaps more than any other single aspect of a criminal trial, is indispensible to "a fair trial and the reliability of the truth determining process". Schneckloth v. Bustamonte, 412 U.S. 218, 236 (1973). See also Holloway v. Arkansas, 435 U.S. 475, 489 (1978); Caraway v. Beto, 421 Fed.2nd 636, 637-38 (5thCir. 1970). When an individual is sentenced to death or life imprisonment, claims of ineffective representation must be examined very closely where the possible penalty is death. See, e.g., Voyles v. Watkins, 489 Fed.Supp. 901, 910 (N.D. Miss. 1980).

The Petitioner readily recognizes that a Trial Court has the discretion to proceed with a criminal case if the administration of justice so requires. U.S. v. Terry, 449 Fed. 2nd 727 (5thCir. 1971). In the case at bar, however, the Trial

Court overruled the Petitioner's Motion simply because the Court felt there was no protected right involved and the appointed counsel was competent to defend the Petitioner. (R. 14). However, Petitioner contends that the Sixth and Fourteenth Amendments to the United States Constitution dictate that a defendant has the right as part of his constitutionally protected right to have effective assistance of counsel, to select counsel of his own choosing unless the administration of justice requires otherwise. The protection afforded to this right of the Constitution requires an investigation into the allegations of the Petitioner and the competence "of counsel is irrelevant in determining whether the protected right has been infringed upon". See Gatsen v. United States, supra; Gadseden v. United States, supra. The mere fact that representation for a particular defendant was adequate, does not allow a Court to override and to infringe upon the defendant's right to select his own counsel.

The defendant's right to representation by retained counsel of choice under the Sixth and Fourteenth Amendments to the United States Constitution as articulated in Powell v. Alabama, supra, and followed by many cases thereafter, was infringed upon by the Texas Trial Court April 17, 1980. The Petitioner was denied his right to be represented by retained counsel of his own choosing. The Petitioner was forced to trial with a lawyer with whom he could not communicate and whom he had no confidence; he had a reasonable opportunity to have counsel of his own choice, however, the Trial Court committed serious error in failing to grant Petitioner's request for a continuance to facilitate the assumption of the case by retained counsel. The Petitioner had requested no prior continuances and none had been granted. The only compelling reason for the failure to grant the continuance was the "inconvenience to the prosecution". The Petitioner was forced to go to trial for his very life with a lawyer who was unprepared, with whom he could not communicate, and whose services he did not want or desire.

Petitioner's Sixth and Fourteenth Amendment right to select counsel of his own choosing and to effectively assist that counsel in his own defense was violated by the Texas Trial Court. The Texas Court of Criminal Appeals, failed to respond to Petitioner's Appeal on this ground; and therefore placed itself in the position of silently denying Petitioner's right and rights as guaranteed by the United States Constitution. The Petitioner's life at stake, this Court should grant Certiorari to resolve this issue.

II.

ADMISSION OF EVIDENCE OF EXTRANEOUS OFFENSE DURING GUILT AND INNOCENCE STAGE OF TRIAL TO PROVE IDENTITY VIOLATED PETITIONER'S RIGHTS UNDER SIXTH AND FOURTEENTH AMENDMENTS.

A fundamental rule of evidence is that an individual charged with a crime is to be tried for the offense charged and no other, and evidence that one is a criminal, generally, is inadmissible. Albricht v. State, 486 S.W.2nd 97 (Tex. Crim. App. 1972). There are exceptions to this basic rule which are well known, such as:

1. when the extraneous offense is res gestae of the charged offense;
2. to prove identity;
3. to rebut a defensive theory;
4. to prove guilty knowledge;
5. to prove intent;
6. to prove motive;
7. to prove system; or
8. in a circumstantial evidence case. Id.

The accused may not be tried for a collateral offense, and therefore can only be prosecuted for the charged crime. Hines v. State, 571 S.W.2nd 322 (1959).

At the Petitioner's trial, over his objection, the Trial Court allowed Theresa Menor to testify that she had seen the Petitioner fire a handgun twice in the direction of a neighbor's house. Later testimony given by Officer Paul Motard of the Houston Police Department established that a slug removed from the dead officer's body matched a slug removed from the aforementioned neighbor's house. The testimony established the slugs came from the handgun belonging to the Petitioner.

The State offered the extraneous offense under the theory that it was necessary to establish identity, an exception to the stated rule excluding such admission. The rule in Texas is that when the identification of the accused is not complete, the prosecution may establish

necessary element by introducing an extraneous offense. Ford v. State, 484 S.W.2nd 727 (Tex. Crim. App. 1972). In the Petitioner's case, the question of identity had been unequivocally established.

The State offered the evidence for the stated purpose and none other. Such an offense would at least be a misdemeanor under the laws of Texas. Under the Texas system of capital murder, the first stage of the trial would clearly have been tainted by the introduction of the extraneous offense. The basic thrust of the Texas statute is to ascertain whether the named defendant committed the act and whether beyond a reasonable doubt there is a probability that the defendant would commit acts of violence that would constitute a continuing threat to society. V.T.C.A. Penal Code §37.071(b)(2). The introduction of extraneous offense at the early stages of trial would have surely prejudiced the mind of the jurors.

In the Petitioner's testimony, he stated that he shot Officer Baker because he was afraid that he was going to be beaten by the officers. He testified he had on several occasions been beaten by law enforcement officers. The Petitioner's basic defense was self-defense. The admission of the extraneous offense certainly weakened his credibility before the jury.

The Texas Court of Criminal Appeals recognized that the admission of the evidence was erroneous, but not such to warrant a new trial. (See Appendix C, pp. 3-5). The Petitioner was on trial for his life and the admission of a serious extraneous offense involving the use of a handgun was highly prejudicial and denied Petitioner's right to a fair trial. It is impossible to be certain that the testimony did not seriously affect the decision making process of the jury; consequently, this Court should grant Certiorari to provide Petitioner with his fair trial.

III.

PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL BY A JURY UNBIASED AND UNPREJUDICED GUARANTEED BY THE FOURTEENTH AMENDMENT WHEN THE COURT PROCEEDED TO TRIAL WITH MARILYN JANET TURNER AS A JUROR.

The Petitioner was forced to stand trial for his life with Marilyn Janet Turner as a juror after she properly informed the Court that an unknown assailant had broken into her home and threatened her with a kitchen knife. (R. 2454). She informed the Court that she could not be fair or impartial. She stated as follows:

> "At this time there's no way I can put that out of my mind. I feel I cannot unpartially judge. All I can think of is I can be dead."
>
> "I do not feel I'm capable of being impartial at this time or much less putting this out of my mind. I cannot concentrate. I honestly feel I would not be fair to the people involved in this case." (R. 2454).

All efforts on the part of the State and the Trial Judge failed to rehabilitate this juror. Marilyn Janet Turner steadfastly adhered to the view that she could not be fair and impartial and place the recent events in her personal life aside. (R. 2455).

In an analagous situation, the Texas Court of Criminal Appeals reversed a conviction when the venireman stated he was prejudiced against a particular defendant; but later stated he could set aside his prejudice in Williams v. State, 565 S.W.2nd 63 (Tex. Crim. App. 1978). In Williams v. State, the Texas Court of Criminal Appeals recognized the gravity of the situation of being on trial for one's life

and would not allow a conviction to stand if the taint of prejudice existed.

In Brandon v. State, 599 S.W.2nd 567 (Tex. Crim. App. 1980). The Texas Court of Criminal Appeals reversed a conviction when it was revealed that the verireman had stated he had a prejudice and bias against the accused because his brother-in-law worked with the homicide division of the police department. Id. The Court properly recognized that a defendant cannot achieve a fair trial where there is the taint of bias or prejudice. Id.

The Trial Court refused to discharge this juror under Article 36.29 V.A.C.C.P. which provides:

> Not less than twelve jurors can render and return a verdict in a felony case. It must be concurred in by each juror and signed by the foreman; provided, however, when pending the trial of any felony case, one juror may die or be disabled from sitting at any time before the charge of the Court read to the jury, the remainder of the jury shall have the power to render the verdict; but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it.

The Trial Court felt that this Article was limited. However, surely the mandate of due process would require that a juror such as Marilyn Turner be disqualified under this Article.

The Petitioner was denied a fair trial guaranteed by the Constitution when this particular juror filled with bias and prejudice was allowed to determine his fate.

IV.

PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL BY A JURY UNBIASED AND UNPREJUDICIAL GUARANTEED BY THE FOURTEENTH AMENDMENT WHEN THE COURT EXCLUDED PROSPECTIVE JUROR MARIAN HALL.

In Witherspoon v. Illinois, supra, this Court stated:

> "we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voice general objections to the death penalty or expressed conscientious or religious scruples against its infliction."

This Court held in Adams v. Texas, supra, that the Texas Penal Code Section 12.31(b) could not be used or interpreted in such a manner that jurors would be excluded on grounds broader than Witherspoon.

The voir dire of prospective juror Marian Hall is found at R. 2416-2454. Her basic objection to the death penalty was as follows:

> Q. . . Do you have any objections, conscientious objections to the infliction of death as a punishment for crime in a proper case?
>
> A. . . No, I guess not.
>
> Q. . . Well, basically, I'm trying to find out, first of all, do you agree with the death penalty or not?
>
> A. . . I can't say. I don't think -- I have to either say yes or no?
>
> Q. . . Yes?
>
> A. . . No. But, on the other hand, I do think I could carry out the law. If that's the law, if I were on the jury, I would carry it out.
>
> A. . . I can't say I object, but I could give somebody the death penalty if there's no other way to make sure

they are not back on the streets."
(R. 2476, lines 9-11).

A. . . I don't believe in the death penalty. I would rationalize that I am not giving it to him, that I am not giving it to him, the State is." (R. 2436, lines 22-24).

The State challenged this prospective juror for cause under Texas Penal Code Section 12.31(b) and the Trial Court sustained the challenge. (R. 2444, 2450-2451). A careful examination of this juror's response clearly shows she was improperly excluded under the rationale of Witherspoon. The exclusion by the Trial Court of this prospective juror means the death penalty cannot be properly imposed. See Davis v. Georgia, 429 U.S. 122 (1976).

Trial Counsel for the Petitioner did not object to the exclusion of this juror. Under the law of Texas, such a failure waives the error. See Boubvare v. State, 542 S.W. 2nd 644 (Tex. Crim. App. 1976); Russell v. State, 598 S.W.2nd 677 (Tex. Crim. App. 1980); Hughes v. State, 562 S.W.2nd 857 (Tex. Crim. App. 1978). However, when an individual's life hangs in the balance, such a waiver by trial counsel should not be fatal to the rights of the Petitioner. The better rule of law would seem to be that in capital cases, such error cannot be waived. See Wigglesworth v. Ohio, 403 U.S. 947 (1970).

Under the rationale of Witherspoon, Adams v. Texas, and Davis v. Georgia, the Petitioner was not afforded a fair trial within the mandates of the Constitution and this Court.

V.

PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL BY A JURY UNBIASED AND UNPREJUDICIAL GUARANTEED BY THE FOURTEENTH AMENDMENT WHEN THE TRIAL COURT EXCLUDED PROSPECTIVE JUROR MILDRED SPENSLEY.

The ground of error regarding prospective juror Mildred Spensley is the same basic argument as set forth in Ground IV with regard to prospective juror Marian Hall.

The voir dire examination of juror Mildred Spensley is set forth at R. 2153-2167. This prospective juror was qualified under the rationale of Adams v. Texas, supra, and Witherspoon v. Illinois, supra. This individual articulated reservations about the death penalty, but stated quite succinctly that she could follow the law and vote death in the proper case.

The critical portion of her voir dire is set forth below:

> Q. . . . Now, do you have any conscientious objections to the assessment of death as a punishment for crime in a proper case?
> A. . . Well, . . . I have maintained many times that in certain circumstances I believed it should occur. (R. 2154, lines 5-10)
> Q. . . You said that you -- well, I was curious as to when you thought the death penalty should occur. You mentioned in some cases you thought it was proper.
> A. . . I have thought about it and discussed. I do think it's proper in certain cases. (R. 2157, lines 9-15)
> Q. . . Do you feel like you have to answer one of those questions no to make sure he got life imprisonment instead of death, regardless of how much evidence the State showed you?
> A. . . No, I don't feel that I have to say no if I felt yes.

Q. . . Do you think you could vote for the death penalty, is that what you are saying?

A. . . I could vote for it, but I would be very unhappy probably the rest of my life. (R. 2162, line 21 - R. 2163, line 4)

It is clear from her answers that this prospective juror was qualified to sit on the jury in this capital murder case. However, the State challenged for cause and the Trial Court sustained the challenge. (R. 2165-67).

Under the rationale of Davis v. Georgia, supra, and Witherspoon v. Illinois, supra, the action of the Trial Court denied the Petitioner of the protection granted him by the Constitution and this Court. Trial Counsel again did not object, but the better rule of law articulated in Wigglesworth v. Ohio is that such failure should not be fatal to the rights of the Petitioner.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CHARLES WILLIAM BASS, Appellant

NO. 68,308 v. - - - Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

O P I N I O N

Appeal is taken from a conviction for capital murder. V.T.C.A. Penal Code, Sec. 19.03(a)(1). After finding appellant guilty, the jury answered "yes" to the three special issues submitted under Art. 37.071(b), V.A.C.C.P. Punishment was assessed at death.

In his fourth ground of error, appellant contends the court erred in admitting evidence of an extraneous offense. He maintains such evidence was admitted solely to inflame the jury.

Patricia Warren testified that on the night of August 16, 1979, she was employed at Shirlee's Lounge in Houston. She related that appellant entered the lounge and ordered a beer. Upon serving appellant, Warren noticed that he had drawn a handgun which he was pointing toward a customer. Warren related that appellant told her to open the cash register and give him the money. Included within the currency given to appellant were several coins which were wrapped in paper coin rollers.

R. A. McCammon testified that on the night of August 16, 1979, he and Charles Baker were employed by the City of Houston as Houston City Marshalls. McCammon explained that their primary duty consisted of serving misdemeanor arrest warrants issued by judges of the municipal courts. While McCammon and Baker were on duty, they saw appellant walking on a sidewalk in a residential area. McCammon related that appellant was stopped because it was thought that he was named in an arrest warrant. At the time he was stopped, it was noticed that appellant was perspiring heavily and that his pocket was bulging with an unknown object. McCammon related that he thought appellant was armed with a chain. However, he discovered that appellant's pocket was full of coins wrapped in paper coin rollers.

McCammon testified that he moved the patrol car while Baker had control of appellant. While moving the car, McCammon heard Baker call for help. He saw appellant and Baker struggling and heard a gunshot. Baker fell to the ground and another shot was fired. McCammon stated that he then drew his own weapon and fired at appellant. The two men exchanged numerous gunshots and appellant eventually ran away. When McCammon approached Baker, he found the officer's handgun on the ground. The gun had not been fired.

Baker died as a result of two gunshot wounds. Dr. Aurelio Espinola, assistant medical examiner for Harris County, testified that one of the gunshot wounds had been a skin contact wound to the stomach. Espinola explained that a skin contact wound results from a weapon being held at close range at the time it is fired at the victim. The other wound, showing no evidence of skin contact, was to the officer's thigh. During an autopsy, two slugs were recovered from Baker's body. Espinola testified that either of the gunshot wounds could have been fatal.

Officer C. W. Kent, of the Houston Police Department, conducted the investigation concerning Baker's death. Kent testified that the gun used to kill Baker was never recovered.

Appellant testified that he committed the robbery at Shirlee's Lounge after realizing that he did not have enough money to pay for the beer he had ordered. He further stated that following the robbery, he had approached McCammon and Baker's patrol car thinking it was a taxi cab. Appellant shot Baker after pulling a gun from inside his pants. He related that at the time of the shooting, Baker was directly behind him and was attempting to subdue him by grabbing him from behind. Appellant stated that he shot Baker because he was afraid that he was going to have his "ass whipped" by the officers. He testified that he had been abused by law enforcement officers on the eight or nine previous occasions on which

he had been arrested. Appellant further admitted to engaging in an exchange of gunfire with McCammon.

The gun appellant used to shoot Baker was thrown into the San Jacinto River. Appellant denied having shot Baker twice. He maintained that he did not shoot the officer in order to kill him, but rather in order to escape the threat of being "whipped."

The extraneous offense of which appellant complains in this ground of error was admitted through the testimony of Theresa Minor. She testified that she knew appellant and that he was at her home two days before Baker was shot. Minor related that appellant was armed with a handgun which he fired twice in the direction of a neighbor's home.

Officer Paul Motard, of the Houston Police Department, testified that he retrieved a slug which was embedded within the wall of the neighbor's home. The slug was compared with the two slugs which were removed from Baker's body. Officer C. E. Anderson, a firearms examiner for the Houston Police Department, testified that all three slugs had been fired from the same handgun.

It is well established that an accused may not be tried for some collateral crime or for being a criminal generally. Hines v. State, 571 S.W.2d 322. In Albrecht v. State, 486 S.W.2d 97, several exceptions to this rule were recognized including: (1) when the extraneous offense is res gestae of the charged offence; (2) to prove identity; (3) to rebut a defensive theory; (4) to prove guilty knowledge; (5) to prove intent; (6) to prove motive; (7) to prove system; or (8) in a circumstantial evidence case.

As stated above, the extraneous offense of which appellant now complains consisted of his actions in firing a handgun in the direction of a residence. Such offense was in no way blended or closely interwoven with the killing of Baker and thus cannot be termed res gestae. There was no question of identity in view of McCammon's testimony and appellant's admission. Likewise, the evidence was not circumstantial in nature. To the extent that appellant's

testimony denying an intent to kill Baker constituted a defensive theory, such was not rebutted by the extraneous offense. Likewise, appellant's intent was established by evidence that he shot the victim at close range with a firearm. Appellant's own testimony supplied the motive for the killing when he stated that he shot Baker in order to avoid being "whipped." Finally, no issue of system or design was present in the case.

We conclude that the extraneous offense of appellant firing a weapon at another's home was erroneously admitted. Such an offense could constitute reckless conduct, criminal mischief or unlawfully carrying a weapon. No evidence was offered to show damage resulting, if any, from the firing of the weapon to elevate the offense above the grade of a misdemeanor. See V.T.C.A. Penal Code, Secs. 22.05, 28.03 and 46.20

A judgment will not be reversed for the erroneous admission of evidence that did not injure the defendant; the question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction. Esquivel v. State, 595 S.W.2d 516. Thus, the decision as to whether the erroneous introduction of an extraneous offense is reversible error is an ad hoc determination based on the merits of each case. Ruiz v. State, 579 S.W.2d 206.

In the instant case, evidence of appellant's guilt was overwhelming. McCammon saw appellant and Baker struggling before Baker was shot. Appellant admitted that he shot Baker when the officer was directly behind him. The medical examiner testified that the skin contact wound to the victim's stomach would have resulted in death within three to five minutes. The extraneous offenses of the aggravated robbery at Shirlee's Lounge and the attempted capital murder of McCamm were admitted without objection. Both offenses are first degree felonies. While testifying, appellant stated that he had been arrested on eight or nine previous occasions.

We conclude that in view of the other evidence presented at trial, there is not a reasonable probability that the complained of misdemeanor extraneous offense might have contributed to appellant's conviction or had any effect upon punishment assessed. No reversible error is shown.

In his second ground of error, appellant contends the court erred in refusing to discharge juror Marilyn Turner. He maintains the juror was disabled due to "a prejudice and bias in her attitude."

The record reflects that voir dire examination in the instant case began on April 22, 1980, and Turner was selected as the fourth juror on April 28, 1980. The voir dire examination was completed when the twelfth juror was selected on May 16, 1980.

On May 27, 1980, prior to the commencement of the trial, the court held a hearing to determine whether juror Turner had become disabled from sitting on the jury. Turner testified that two days before the hearing, an individual had broken into her home and entered her bedroom with a knife. She related that appellant was not the individual who entered her home and that the actual perpetrator of the offense had been apprehended. Turner stated that she wanted to "disqualify" herself as juror and that she had doubts as to her ability to "impartially judge."

Appellant contends that due to "a bias and prejudice in her attitude," the court should have found Turner to have been disabled from sitting on the jury and provided him with the following options "(1) Ask if Appellant would agree to proceeding with eleven jurors; (2) select another juror to replace Turner; or (3) declare a mistrial and select another jury." Appellant's contention is based upon the premise that Turner was disabled due to bias and prejudice against him and that she should have been discharged as disabled from sitting on the jury.

As stated above, the jury selection process had been completed at the time the court learned of Turner's experience. The parties were unable to agree as to the matter of her discharge. The question thus becomes whether she was disabled and should have

been declared as such by the court under the provisions of Art. 36.29, V.A.C.C.P. That statute provides:

> "Not less than twelve jurors can render and return a verdict in a felony case. It must be concurred in by each juror and signed by the foreman; provided, however, when pending the trial of any felony case, one juror may die or be disabled from sitting at any time before the charge of the court is read to the jury, the remainder of the jury shall have the power to render the verdict; but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. After the charge of the court is read to the jury, if any one of them becomes so sick as to prevent the continuance of his duty, or any accident of circumstance occurs to prevent their being kept together under circumstances under which the law or the instructions of the court requires that they be kept together, the jury may be discharged."

In Carrillo v. State, 597 S.W.2d 769, the defendant urged the court erred in discharging a juror as disabled under the terms of Art. 36.29, supra, due to her alleged bias and prejudice. This Court concluded that the trial court's actions had been erroneous because the term disabled under Art. 36.29, supra, does not encompass bias and prejudice as a disability. We further stated:

> "We conclude that the trial court before discharging the juror should have advised the appellant he would continue the trial without discharging the juror unless the appellant either agreed to continue the trial with eleven jurors or asked for a mistrial. The court should then, depending on the appellant's election, have granted a mistrial or continued with eleven jurors. If the appellant refused to make an election the court should not have discharged the juror, but continued the trial without discharging the juror. The trial court erred in failing to give the appellant an opportunity to choose between continuing with eleven jurors or seeking a mistrial." Id. at 771.

Likewise, in Marquez v. State, ___ S.W.2d ___ (No. 60,942 del. 6/16/81), it was found that there was no basis shown to support the trial court's ruling that a juror was disabled under Art. 36.29, supra. It was thus concluded that the erroneous ruling resulted in the defendant being convicted by a jury of eleven instead

of twelve and that the conviction must be reversed.

In the instant case, the court did not propose to discharge Turner as disabled. Rather, appellant sought to have her discharged and declared disabled due to bias and prejudice. Such an alleged condition does not render a juror disabled under Art. 36.29, supra. Carrillo v. State, supra. Had the court discharged Turner on the basis of bias and prejudice, without the consent of all parties, such a ruling would have been erroneous. No error is shown in the court refusing to find Turner disabled due to her alleged bias and prejudice. Appellant's second ground of error is overruled.

In his third ground of error, appellant further contends the court erred in refusing to discharge juror Turner. He maintains that she was disabled from sitting because she was "unable to concentrate mentally on the testimony."

With regard to the effect of the burglary on her ability to concentrate, Turner stated:

"Q. . . . But we are trying to find out how you feel, see what the possibilities are. If the law was such that you couldn't be disqualified from this jury, since you have already been picked, would you do the best you could to try to be fair, not let what happened to you this past weekend affect your verdict?

"A. As I said, it's very hard for me to concentrate. My concentration is totally numb. I don't think I would be able to pay attention to what was going on. I have not been able to do my work. I have not been able to sleep. As I said, I don't think that's going to go away. It's going to take time.

"Q. I'm not trying to force you to do something that you feel like that you don't want to do. Of course, nobody wants to.

"A. I'm willing to do my civic duty or I would not have come in.

"Q. That's the point I'm trying to make. It's just that we may not have any alternative but to keep you on the jury legally. If that happened, I'm hoping you would be able to try to listen to the evidence as best you could.

"A. The best I could, but my concentration is not there."

After the court refused to find Turner disabled, the following colloquy took place:

> "THE COURT: Mrs. Turner, for the record, I must advise you that the law does not permit the Court to excuse you from this jury once you have been sworn, under the circumstances. Now, because of the events that you related to the Court and to the Attorneys for both the Prosecution and the Defense, I'd like to request and instruct you not to discuss your personal misfortune with any of the other jurors, because those facts have no bearing upon the facts in this case. And the law does contemplate that jurors, once they are sworn, that they will follow the law the Court has given to them in the instructions to the jury. Do you think you will have any difficulty in following the Court's instructions with regard to the law?
>
> "MRS. TURNER: I will do my best."

As in the previous ground of error, appellant sought to have the court discharge Turner as disabled pursuant to Art. 36.29, supra. The matter arose after completion of the jury selection process. The parties were unable to agree as to the matter of her discharge. The issue is therefore whether the court abused its discretion in refusing to discharge Turner as disabled from sitting on the jury.

In Griffin v. State, 486 S.W.2d 948, it was stated that the term disabled within Art. 36.29, supra, means any condition that inhibits the juror from fully and fairly performing the functions of a juror. In Carrillo v. State, supra, it was concluded that the Legislature's intent was to limit the application of Art. 36.29, supra, to those cases where the juror was physically or mentally impaired in some way or all the parties consented to trying the case with just eleven jurors. The determination as to whether a juror is disabled is within the discretion of the trial court. Absent an abuse of that discretion, no reversible error will be found. Griffin v. State, supra.

In support of his contention that the court erred in refusing to discharge Turner as emotionally disabled, appellant relies on Clark v. State, 500 S.W.2d 107. There, the court found a juror emotionally disabled due to the death of his father-in-law and the

need to travel immediately to Louisiana with his wife. However, unlike the instant case, both parties in Clark consented to the court's action in discharging the juror as disabled. In finding no error in the discharge of the juror, this Court stated:

> "Here the court found that the juror was disabled. Both appellant in person and his attorney agreed to this finding and to proceed with eleven jurors. Evidently they did not consider that the judge was abusing his discretion, else an issue could have been made and evidence heard, from which this Court might determine whether abuse of discretion existed. We perceive none, and overrule ground of error number two." Id. at 109.

In the instant cause, Turner was understandably upset at the time of the hearing. She indicated that she was having difficulty in concentrating and was at times nauseous. On the other hand, she stated that she was willing to do her "civic duty" and would do "the best [she] could" while serving on the jury. Appellant did not question Turner at the time he sought to have the court discharge her as disabled. Further, there was no evidence offered at the hearing on appellant's motion for new trial with regard to the effect, if any, which the incident had on Turner's verdict at either phase of the trial or any difficulty she may have had as serving as a juror.

In determining whether the court abused its discretion in failing to discharge Turner as disabled, this Court has been provided with nothing more than a cold record. However, at the time of the hearing, the trial court, in determining the issue, had the opportunity to observe Turner's demeanor and listen to the tone of her voice. Based upon this record, we cannot conclude the court abused its discretion in refusing to discharge Turner as disabled from sitting on the jury. Appellant's third ground of error is overruled.

In his first ground of error, appellant contends the court erred in sustaining the State's challenge for cause to prospective juror John Mooney. The veniremen was excused on the basis of a mental defect which rendered him unfit for jury service.

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Mooney testified that he had been committed to a mental hospital in San Antonio for twenty-nine years. In another portion of his testimony, the seventy-one-year-old venireman related that his commitment had been from 1936 until 1969. Mooney stated that his commitment had resulted from being declared "a person of unsound mind." He testified that he had suffered a "mental disorder" as a result of a blow to the head in an automobile accident. Following his release from San Antonio, Mooney was referred to the Texas Research Institute of Mental Science (TRIMS) in Houston. He testified that he is classified as an outpatient at TRIMS and has a monthly appointment with a psychiatrist. Mooney related that the psychiatrist has prescribed medication for him, including a daily dosage of Thorazine, which he will be required to take for the rest of his life.

Following his discharge in San Antonio, Mooney was employed by Rice University until retirement. The record does not reflect how long he was so employed. He related that at the present time, as a hobby, he is a locksmith. Mooney stated that he is married and manages his own affairs other than those taken care of by his wife. Finally, Mooney related that following his discharge from San Antonio, he had not gone through a formal restoration proceeding. See TEX. REV. CIV. STAT. ANN. Art. 5547-81(c) (Supp. 1980-1981).

Art. 35.16, V.A.C.C.P., sets forth the various reasons upon which challenge for cause may be made to a prospective juror. In that regard, Art. 35.16(a)(4), supra, provides:

> "(a) A challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury. A challenge for cause may be made by either the state or the defense for any one of the following reasons:
>
> ". . .
>
> "4. That he is insane or has such defect in the organs of feeling or hearing, or such bodily or mental defect or disease as to render him unfit for jury service, or that he is legally blind and either the court or the state in its discretion or the defendant or the prospective juror in his discretion is not satisfied that he is fit for jury service in that particular case;"

In Von Byrd v. State, 569 S.W.2d 883, the defendant urged that the trial court had erred in granting a State's challenge for cause to a prospective juror based upon Art. 35.16(a)(4), supra. No error was found in the sustaining of the challenge and we stated as follows:

> "The evidence in the present case is very sparse. There was documentary evidence that Bailey had been adjudged insane on March 2, 1976. Cf. Article 35.18, Vernon's Ann.C.C.P. There was also evidence that Bailey was 'unstable' on October 24, 1976. Of course, Bailey testified that she had been released from Rusk, and that she had undergone a restoration hearing, and that she was not under the care of a doctor or taking medication. However, we conclude that the trial judge, as the trier of fact on the issue of whether Bailey was properly subject to challenge for cause pursuant to Article 35.16(a)(4), did not abuse his discretion by excluding Bailey. Appellant's fourth contention is overruled." (Footnotes omitted) Id. at 892.

The record in the instant case reveals that after being declared "a person of unsound mind," Mooney had been committed to a mental institution for at least twenty-nine years. Unlike the prospective juror in Von Byrd, Mooney had not undergone a restoration hearing and he was still under the care of a doctor. Finally, he was on daily medication which is indicated "for the management of manifestations of psychotic disorders."[1/] We find no abuse of discretion in the court, as the trier of the facts, sustaining the State's challenge for cause to Mooney under Art. 35.16(a)(4), supra. Appellant's first ground of error is overruled.

In his fifth ground of error, appellant contends the court erred in granting the State's challenge for cause to prospective juror Marian Hall. He maintains that "Hall was improperly excluded under the rationale of Adams v. Texas, 448 U.S. 38 (1980) and Witherspoon v. Illinois, 391 U.S. 510 (1968)."

[1/] Baker, Physicians' Desk Reference 1691 (35th ed. 1981).

The record reflects that at the time the State's challenge for cause was made and sustained, appellant failed to voice an objection to the court's action. In Crawford v. State, 616 S.W.2d 923, we noted that this Court has consistently held that the failure to object to the alleged improper exclusion of a prospective juror in a capital murder trial, waives the error for purposes of appeal. We find that appellant may not complain of the exclusion of prospective juror Hall for the first time in this appeal. See White v. State, 610 S.W.2d 504; Boulware v. State, 542 S.W.2d 677.

In his sixth ground of error, appellant contends the court erred in granting the State's challenge for cause to prospective juror Mildred Spensley. He maintains Spensley was improperly excluded under Adams v. Texas, supra, and 'Witherspoon v. Illinois,' supra.

The record reflects that during the voir dire examination, Spensley was asked the following question by the prosecutor:

> "Q. To make sure, I've got to get it clear for the record, you feel like you could not participate in a capital murder case: if you get to the punishment part of the trial and evidence was presented to you that convinced you beyond a reasonable doubt that he did it deliberately and there was a probability he would do violent criminal acts again and the answers to those questions should be yes and the evidence convinced you beyond a reasonable doubt, you still would not be able to say yes to the questions because you know if you did, he would get the death penalty; is that accurate or not?
>
> "A. Yes."

In an apparent effort to rehabilitate the prospective juror, appellant's counsel asked her:

> "Q. . . . Don't you feel if you were a member of this jury, that you could vote whatever you said your conscience should be, if they so convinced you that this young man deliberately killed someone and that he, from the evidence

> you would hear from the witness stand, would more likely -- that there is a probability he would again commit criminal acts of violence, don't you think you could say yes to a question if you felt that way?
>
> "A. No.
>
> "Q. Regardless of what the facts were?
>
> "A. No, I don't."

As this Court noted in White v. State, 543 S.W.2d 104:

> ". . . it was made abundantly clear in Witherspoon that the decision reached therein had no bearing on the right of the prosecution to challenge for cause any prospective juror who stated that he would automatically vote against the imposition of capital punishment without regard to the evidence which might be developed at the trial or that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt." Id. at 106.

Spensley's testimony thus reflects she would have voted in such a manner as to avoid the death penalty for appellant without regard to the evidence which might be developed at trial. Under such circumstances, she was properly excused under the standards set forth in Witherspoon. See Esquivel v. State, 595 S.W.2d 516. We further note that appellant's failure to object at the time Spensley was excused, preserves nothing for review. Crawford v. State, supra. Appellant's sixth ground of error is overruled.

The judgment is affirmed.

TOM G. DAVIS, Judge

(Delivered September 23, 1981)

EN BANC

Roberts and Teague, JJ., dissent

McCormick, J., concurs in result

Clinton, J., not participating

GROUND OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION BY NOT GRANTING APPELLANT'S MOTIONS REQUESTING WITHDRAWAL OF THE COURT APPOINTED COUNSEL AND CONTINUANCE OF THIS CAUSE OF ACTION; THEREBY DEPRIVING APPELLANT OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL.

The right to counsel is an essential and vital component in the overall scheme of due process and is therefore the keystone of our adversary system of criminal justice which can be traced to the landmark case of Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed 158 (1932). In Powell, the Supreme Court held that the right of an accused person to have the aid of counsel for his defense, particularly in a capital offense case, was one of the fundamental rights guaranteed by the due process clause of the Fourteenth Amendment to the U.S. Constitution. Id. This fundamental right was extended by the Supreme Court in later decisions to be not only a right to the assistance of counsel, but effective assistance of counsel. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 7 L.Ed 2d 799 (1963), Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed 2d 530 (1972). Mere representation of an individual by a given attorney does not necessarily meet the mandate of due process; rather the representation must be such that the Defendant is able to assist in his defense. See United States ex rel Carey v. Rundle, 409 F2d 1210, 1212-15 (3rd Cir 1969), cert denied, 397 U.S. 949, 90 S.Ct. 964, 25 L.Ed 2d 127 (1970).

In Chandler v. Fretag, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed 4 (1954), the Supreme Court further defined that the right to counsel guaranteed by the Constitution meant that not only was the Defendant entitled to representation by legal counsel, but that said individual "... must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth". Id. at pp. 9-10; 75 S.Ct. at 4. Furthermore, in Chandler v. Fretag, the Court stated that the failure to grant a continuance to obtain legal counsel is tenamount to abuse of discretion and

the violation of given Defendant's constitutional right to have assistance of counsel. Id.

In the case at bar, the Trial Court flatly refused to grant Appellant's Motion for a continuance which would enable appointed counsel to withdraw and chosen counsel to properly defend. The Trial Court did not perceive that the Constitutional right to assistance of counsel was presented by Defendant's Motions (R.14).

> "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case particularly in the reasons presented to the Trial Judge at the time the request is denied."

Gandy v. State of Alabama, 569 F2d 1318 (5th Cir 1978). The Court of Appeals in the 5th Circuit revealed by the language cited above that a reviewing Court must carefully examine the circumstances surrounding a denial of a Motion for continuance in determining whether Defendant's Constitutional right to counsel has been abridged. In the case at bar, the Appellant was an indigent who had an attorney appointed by the Court to represent him. The Appellant could not communicate with this attorney and did not trust him (R.6). The Appellant was unable, because of his stated poverty, to obtain legal assistance other than his appointed counsel until shortly before the trial date (R.6-7). When the Appellant was able to obtain chosen counsel, he properly tendered a Motion Pro Se to have appointed counsel removed. The change in counsel obviously necessitated a reasonable delay. However, the Trial Court flatly refused to allow Appellant to discharge his appointed counsel, whom he did not trust.

The right to have assistance of counsel has been extended to allow a Defendant the opportunity to obtain the counsel of his choice to prepare and conduct his defense. Id. "The right to counsel is a basic right, and the ability to choose one's own counsel is a vital element in the exercise of this right." Cleveland v. United States, 322 F2d 401, 402 (D.C. Cir. 1963).

In other words, the right to have the assistance of counsel includes the right to select legal counsel of one's own choosing. See U.S. v. Liddy, 348 F. Supp. 198 (D.C. Dist 1972); United States ex rel O'Neill v. Rundle, 230 F. Supp. 323 (E.D. Pa. 1964), Aff'd 341 F2d 303 (3rd Cir. 1965), cert. denied 381 U.S. 944, 85 S.Ct. 1783, 14 L.Ed 2d 707 (1965); Mulkovich v. State, 243 N.W.2d 198 (Wis. 1976); People v. Jeffry, 418 N.E.2d 880 (Ill. App. 1981); People v. Thompson, 416 N.E.2d 1105 (Ill. App. 1981); People v. Green, 248 N.E.2d 116 (Ill. 1969).

The Supreme Court of the United States also has expressly addressed this particular issue. The Court ruled in Crooker v. California that the right to have the assistance of counsel when confronted by criminal charges includes the essential element of choosing counsel of one's own preference. 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed 2d 1448 (1958); Powell v. Alabama, supra at 45.

The right to have the assistance of counsel of one's own choosing has been articulated by the Courts as the right to employ a particular attorney provided the particular Defendant uses diligence in obtaining the services of selected counsel. Long v. State, 166 S.E.2d 365 (Ga. App. 1975). The Defendant should not be deprived of the right to be represented by chosen counsel unless the Court finds it absolutely necessary. Such deprivation would clearly be a violation of Defendant's due process right to assistance of counsel. Id.

Various Courts throughout the country have allowed the criminal Defendant to discharge his attorney, with approval of the Court, at any time prior to trial and thereafter hire new legal counsel. State v. George, 414 P.2d 730 (Ariz. 1966). The failure to allow an attorney one day prior to trial to withdraw from a case when the attorney-client relationship had broken down has been ruled an abuse of Trial Court's discretion. People v. Williams, 194 N.W.2d 337 (Mich. 1972). In People v. Williams, the attorney and his client stood before the Court and

stated that they had irreconcilable differences and a withdrawal of counsel was needed; however, the Court refused to grant a continuance. Id. The Michigan Supreme Court therefore felt the Defendant had not received the assistance of counsel guaranteed by the Constitution. Id.

The Appellant in this cause would not lead this Court to believe that the right to have counsel of one's own choosing is absolute. When the proceedings have advanced to the trial stages, the Court has the discretion to overrule the request to change counsel. The proper exercise of discretion requires the Trial Court to balance the Defendant's due process right to representation by chosen counsel and the Court's interest in the orderly administration of justice. See United States v. Uptan, 531 F2d 1281 (5th Cir 1976). The Court should weigh various factors in determining whether or not to grant Defendant's request. Some of the factors which have been considered in the federal system are as follows:

(1) The length of requested delay;

(2) Whether any continuances have been granted previously;

(3) Whether the delay sought is for a legitimate reason, or whether it is dilatory and contrived; and,

(4) The effect the continuance would have on the litigants, witnesses, respective counsel and the Court.

See Giacalone v. Lucas, 445 F2d 1238 (6th Cir 1971) cert denied, 405 U.S. 922, 92 S.Ct. 960, 30 L.Ed. 2d 793 (1972).

Examining the criteria set forth by the 6th Circuit Court of Appeals against the facts in this case seem to clearly weigh in favor of the Defendant/ Appellant. The Appellant sought a delay of approximately three months for a trial which had been set for less than two months. It is not unusual for the trial preparation for a capital offense to far exceed two months. Secondly, neither the Appellant nor the State had requested a prior continuance in this

matter (R.8). Thirdly, the Appellant requested the delay because he felt he could not assist the appointed counsel with his defense. Irreconcilable differences had developed between the Appellant and his attorney (R.6-7). The Appellant had not sought the change prior to April 17, 1980, because he had been unable to obtain counsel of his own choosing until the Southern Poverty Law Center and other named attorneys offered their assistance (R.12). Finally, the convenience factor was only addressed by the Assistant District Attorney when he stated two potential witnesses had already died prior to trial (R.9). The Defendant/Appellant should not be penalized because of the death of two possible witnesses. A reasonable delay was required for the proper preparation of his defense. This was not a case which had been set for trial for months, but rather Mr. Bass was being swept through the criminal justice system with an attorney he did not want. He was arraigned on February 28, 1980, and the trial began April 22, 1980, less than two months later. Surely a request for three months would not be unreasonable or inconvenient when the Court considers that a man's life was at stake.

The Defendant's right to be represented by counsel of his own choosing should not be abridged simply because the exercise of this right would inconvenience the prosecution to some degree. The convenience of the Court and prosecutor are of secondary importance when balanced against the protected rights of the Defendant. Patton v. State of North Carolina, 315 F2d 643 (4th Cir 1963). The rights of the Defendant can not and should not be manipulated to interfere with the fair administration of justice; but the Defendant must have reasonable confidence in his counsel and, hence, if the confidence in his counsel is lost, the Defendant should be granted a continuance to obtain new representation. U.S. v. Bentoena, 319 F2d 916 (2nd Cir 1963), cert denied 375 U.S. 940, 84 S.Ct. 345, 11 L.Ed. 271 (1963); U.S. v. Marshall, 137 F 2d 1006, 1010 (2nd Cir 1943).

In the present case, the Appellant requested a change in counsel and the Trial Judge refused to grant this request. Therefore, the action of the Court prevented the Appellant from being represented by the counsel he selected. The Trial Judge refused to grant the Appellant's request simply because he had assigned Mr. Blaine to the case and knew personally that appointed counsel "... was competent to represent the Appellant or any other Defendant charged with a serious criminal offense" (R.5). Whether or not a particular attorney is adequate or competent to represent a given Defendant is not relevant to the issue confronting the Trial Court. The Defendant in a criminal setting has the right to select the counsel to represent him. The fact that previous counsel is competent does not override the Constitutional right of the Defendant to select the counsel of his own choosing. See Galssen v. United States, 315 U.S. 60, 62 S.Ct. 45, 86 L.Ed 680 (1942); United States v. Johnston, 318 F 2d 288 (6th Cir. 1963); Gadsden v. United States, 223 F 2d, 627 (D.C. Cir. 1955). Consequently, the fact that Mr. Blaine was supposedly adequate to defend the Appellant does not override Appellant's right to be represented by counsel of his own choosing. The Court was aware of differences between the appointed counsel and Defendant, yet elected to proceed without investigating into the alleged differences.

There have been numerous occasions where this fundamental right of the Defendant in the criminal setting has been exercised on short notice. In the Rundle case cited herein, the Defendant requested a continuance on the day of trial to obtain counsel of his own choosing. United States ex rel Carey v. Rundle, supra at 1215.

In Patton v. North Carolina, the Supreme Court of North Carolina stated that the fact that a Defendant had not been granted or even requested prior continuances should be weighed heavily in his favor in determining whether or not the Trial Court abused its discretion in not granting a

continuance to allow for a change of counsel. Patton v. North Carolina, supra at 643. In the present case as previously stated, the Appellant requested a continuance for the first time five days prior to the date set for the trial. The Appellant had not sought or been granted any prior continuances for any reasons.

"To compel one charged with grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever." Brown v. Craven, 424 F2d 1166, 1170 (4th Cir 1970). The 4th Circuit Court of Appeals in Brown v. Craven stated that when the issue was raised in the lower Court that the Defendant could not assist his counsel because of differences between the two, then the Trial Court should conduct a serious investigation into the basis of such claim. Id. This Appellant Court recognized the protection afforded to the right to select one's own counsel. In the case at bar, the Trial Judge refused to consider Defendant/Appellant's Motion unless they were adopted by appointed counsel (R.5). Furthermore, the Court did not investigate into the basis of the discord between Appellant and appointed counsel.

The case law in Texas regarding the issue before the Court does not resolve the Appellant's case. The cases which have been decided are distinguishable. The Appellant recognizes that the Texas Court of Criminal Appeals has been confronted on many occasions with an indigent Defendant, who became dissatisfied with his appointed counsel and requested the Court appoint another attorney. The Texas Courts have also been faced with cases wherein the Defendant sought, on the day of trial, to discharge his appointed counsel and be granted a continuance to seek other counsel. The Defendant in each case was an indigent and the lower Courts properly recognized the fact that the Defendant would not be able to employ counsel and was, in all liklihood,

simply stalling. See Boykin v. State, 487 S.W.2d 128 (Tex Crim. App. 1972); Rodriquez v. State of Texas, 440 S.W.2d 860 (Tex Crim. App. 1969); Robles v. State of Texas, 577 S.W.2d 699 (Tex Crim. App. 1979); Keys v. State of Texas, 486 S.W.2d 958 (Tex Crim. App. 1972); Rogers v. State of Texas, 488 S.W.2d 833 (Tex Crim. App. 1973) and Miller v. State of Texas, 479 S.W.2d 670 (Tex Crim. App. 1972). In several of these cases, the Defendant waited until the day of trial to seek a change of counsel. Furthermore, the respective Defendants had made no advance attempt to secure new legal counsel. The Texas Court of Criminal Appeals was correct in reaching the conclusion that the action taken by the particular Defendants was an attempt to interfere with the orderly administration of the Texas criminal justice system.

In the present case, the facts present distinquish this case from those prior cases before the Texas Court of Criminal Appeals. The Appellant was an indigent with appointed counsel. However, the Appellant voiced objections to his appointed counsel prior to making his Motions Pro Se on April 17, 1980. The Appellant submitted Affidavits and Statements to the Court to be considered. In these Statements he outlined to the Court the basis for his dissatisfaction with appointed counsel. The efforts on the Appellant's part were rewarded by the Southern Poverty Law Center and other attorneys agreeing to conduct his defense. Therefore, the Defendant/Appellant was fully prepared to proceed with retained counsel within a reasonable time. The Defendant/Appellant had not sought a continuance prior to April 17, 1980. Clearly the present case is distinquishable from the line of cases which have hereto confronted this Court, particularly where, at the hearing on Defendant/Appellant's Motion for a reasonable continuance, one of the members of Bass' proposed defense attorneys appeared and assured the Court that he and other named attorneys stood ready to assume responsibility for Bass' defense upon being granted a modest continuance to facilitate investigation and trial preparation.

Cases in Texas also support Defendant/Appellant's claim of Constitutional protection to his right to be represented by counsel of his own choosing. In Gomez v. Heard, 218 F. Supp. 228 (S.D. Tex 1962), the District Court was confronted with the following facts: the Defendant, V.A. Gomez, was charged with receiving and concealing stolen property with a value in excess of fifty dollars, a felony. The Defendant consulted a number of local attorneys in an attempt to find legal representation. Finally, Mr. Gomez employed an attorney from Houston to represent him. When the case was called for trial, the Defendant filed a Motion for continuance stating his attorney was engaged in a trial in another state and therefore could not represent the Defendant on the date in question. The Trial Court refused to grant the Defendant's request for continuance and appointed another attorney to represent the Defendant. The aforementioned request for continuance was his first such Motion. Id. The Federal District Court ruled that the Trial Court's action effectively deprived the Defendant of his right to be represented by chosen counsel. Id.

In the case before the Court of Appeals, the Appellant, Charles William Bass, found himself in a situation similiar to the Defendant in Gomez v. Heard. The Appellant sought a continuance which would enable him to be represented by counsel who were firmly committed to his defense, but who were engaged in other immediate trials. However, the Trial Court refused to grant the Appellant the necessary continuance needed for his counsel to prepare his defense, and to conclude prior commitments.

The Appellant recognizes that a Trial Court has the discretion to proceed with a criminal case if the administration of justice so requires. U.S. v. Terry, 449 F2d 727 (5th Cir 1971). In the case at bar, however, the Trial Court overruled the Appellant's Motions simply because the Court felt there was no protected right involved and the appointed counsel was competent to defend

the Appellant (R.14). However, federal decisions, based upon Constitutional principles require an investigation into the allegations of the Appellant and the "competence" of counsel is irrevelant in determining whether the protected right has been infringed upon. Glasser v. United States, supra; and Gadsden v. United States, supra. These decisions uniformly held that representation of the Defendant was adequate, but that fact alone was not sufficient to overcome the infringement of Defendant's right to select his own counsel. Id. It must be remembered that in each of these decisions, the Court of Appeals examined the record before it and determined specifically that the respective Defendants had been adequately represented, but they deserved new trials because they had been denied the right to be represented by chosen counsel. Id.

GROUND OF ERROR NUMBER 2

THE TRIAL COURT ERRED IN PROCEEDING TO TRIAL WITH MARILYN JANET TURNER AS A JUROR AFTER SHE INFORMED THE COURT THAT A NARROW ESCAPE FROM HER OWN MURDER THE DAY BEFORE TESTIMONY BEGAN CREATED A PREDJUDICE AND BIAS IN HER ATTITUDE.

The fourth juror selected was Marilyn Janet Turner (R.672). After her selection, in the early morning hours on Sunday before trial testimony began on Monday, she was awakened in her bedroom by a burglar who was standing by her bedside with a knife in his hand (R.2581-2582). She told the Court:

> "At this time there's no way I can put that out of my mind. I feel I cannot impartially judge. All I can think of is I can be dead."
>
> "I do not feel I'm capable of being impartial at this time or much less putting this out of my mind. . . . I honestly feel like I would not be fair to the people involved in this case."
>
> "Perhaps if I look back in a year or so, I can put it in perspective, but I honestly don't feel like I can do that now. In fairness to those involved, I feel like I should disqualify myself." (R.2582 lines 2-4, 6-8, 19-27).

The trial judge attempted to rehabilitate her by asking, ". . . would you do the best you could to try to be fair, not let what happened to you this past weekend affect your verdict," but she steadfastly insisted: "I don't think that's going to go away." (R.2583 lines 5-13).

Appellant objected to going to trial with this juror. (R.2585 lines 6-7, R.2588 lines 4-5, R.2589 lines 11-12). The trial court overruled Appellant's objection, and forced Appellant to be tried by a juror who barely escaped death by a criminal the night before and who said, "all I can think of is I can be dead." (R.2589 lines 2-8).

The Court had several options. A similar situation arose in Carrillo v. State, 597 S.W.2d 769 (Tex.Crim.App. 1980), when a juror, after hearing testimony for approximately thirty minutes, informed the Court of her newly discovered and experienced bias and prejudice. The trial court erred in excusing the juror on the grounds of bias and prejudice, and, in reversing the conviction, this Court said the options were to have advised Appellant that he would continue the trial without discharging the juror unless either Appellant agreed to continue the trial with eleven jurors or asked for a mistrial. In the instant case, the Court did not give Appellant such a choice, but forced him to trial with an acknowledged bias and prejudiced juror.

Perhaps the Court had another option. Unlike Carrillo, testimony had not begun. The Court could have excused the juror and allowed another juror to be selected. The jury selection process in a capital murder case lends itself easily to that solution, since each juror is questioned individually, and the jurors are selected one at a time. Appellant was agreeable to discharging juror Turner, if placed on equal footing with the prosecution in terms of peremptory strikes. That is, either give Appellant three additional peremptory strikes to match the three remaining strikes reserved by the State, or have the Court rule that neither side had any peremptory strikes in choosing a replacement for Juror Turner. (See R.2587 lines 21-24, R.2588 lines 609, 20-25).

Recently, the Court has changed some of the long-existing rules regarding discharging of jurors after their selection.

See Sanne v. State ____ S.W.2d ____ (No.63,254 decided September 10, 1980) which overruled the rule of Ellison v. State, 12 (Tex.Crim. App. 557). The present case illustrates the need, perhaps, to establish a rule that once a jury is selected in a capital case, if a juror becomes disqualified by reason of prejudice or bias, the juror can be excused and another selected in the manner authorized in a capital case.

It is patently offensive to force a Defendant to trial with a prejudiced and bias juror. This Court has been sensitive to the need to have fair and unbiased jurors. It has reversed cases in which a proper challenge for cause due to bias, prejudice, and an inability to impartial was denied in the selection process.

In Williams v. State, 565 S.W.2d 63 (Tex.Crim.App. 1978), the venireman stated that he was prejudiced against Appellant as a result of his experience with him and that his deliberations as a juror would be affected. Later, the venireman stated that he could disregard his past association with Appellant and base his decision on the evidence and the Court's charge. This Court, realizing that such formal statements are merely perfunctory when prejudice and bias is involved, reversed the conviction. In the instant case, the juror never stated that she could disregard her tragic experience the day before, when she was herself almost a murder victim, despite every effort to have her do so by the trial judge. The instant case is surely more aggravated than in Williams.

In Brandon v. State 599 S.W.2d 567 (Tex.Crim.App 1980), the venireman said that his brother-in-law worked with the homicide division of the Waco Police Department, and because of this he had a bias and prejudice against the accused. This Court reversed saying,

> . . . but it is to be remembered that a venireman who has expressed bias and prejudice against an accussed . . . can almost never be rehabilitated--the prospective juror should be excused for cause as a matter of law." at 572.

The proper choices for the trial court, confronted with Appellant's proper objection to proceeding to trial with this juror was: (1) Ask if Appellant would agree to proceeding with eleven jurors; (2) select another juror to replace Turner; or (3) declare a mistrial and select another jury.

The improper choice was to force Appellant to trial in a capital murder case with a juror who had experienced a tragic brush with death at the hands of a criminal only a matter of hours previously. This improper choice requires reversal.

GROUND OF ERROR NUMBER 3.

THE TRIAL COURT ERRED IN PROCEEDING TO TRIAL WITH MARILYN JANET TURNER AS A JUROR AFTER SHE INFORMED THE COURT THAT A NARROW ESCAPE FROM HER OWN MURDER THE DAY BEFORE TESTIMONY BEGAN CAUSED HER TO BE DISABLED FROM SITTING BECAUSE SHE WAS UNDERSTANDABLY UNABLE TO CONCENTRATE MENTALLY ON THE TESTIMONY.

The facts surrounding Juror Turner's tragic personal experience the day before testimony began have been stated under the previous Ground of Error and will not be restated. The juror was not only prejudiced and biased as a result of this experience, she became disabled mentally and emotionally to serve as a juror.

She told the Court that she could not put the experience or the thqught that she could be dead out of her mind, and that she could not concentrate (R.2582 lines 4-8). Further, she said she could not sleep and was agitated; (R.2582 lines 17-18). She said:

> "My concentration is totally numb. I don't think I would be able to pay attention to what was going on. I have not been able to do my work. I have not been able to sleep." (R.2583 lines 8-12). . . .
>
> ". . .my concentration is not there" (R.2583 line 23)
> . . .
>
> "It hits me in the stomach, I have nausea and diarrhea . . . Quite frankly, I didn't know whether I'd made it down herethis morning" (R.2583 line 25--R.2584 line 2).

Article 36.29 V.A.C.C.P. provides:

> Not less than twelve jurors can render and return a verdict in a felony case. It must be concurred in by each juror and signed by the foreman; provided, however, when pending the trial of any felony case, one juror may die or be disabled from sitting at any time before the charge of the court is read to the jury, the remainder of the jury shall have the power to render the verdict; but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it.

The disability of this article is limited to a physical, emotional or mental disability. Carrillo v. State, 597 S.W.2d 769 (Tex.Crim.App 1980). In Griffin v. State, 486 S.W.2d 948 (Tex.Crim.App 1972), the Court said, "Disabled, as used herein, means any condition that inhibits the juror from fully and fairly performing the functions of a juror." The physical and mental disability is clearly stated by the juror. Certainly, the situation is more grievous than in Clark v. State, 500 S.W.2d 107 (Tex.Crim.App. 1973), when a juror was excused because he was emotionally upset over the death of a father-in-law.

Appellant's objection to continuing with the juror who had become so disabled should have been honored (R.2585, 2588, 2589). The Court should have done one of the following:

(1) Discharged the juror under the provision of Article 36.29 V.A.C.C.P.

(2) Allowed another juror to be chosen;

(3) Declared a mistrial, based on Appellant's objection, and selected another jury.

The inclusion of this juror, in her state of mind, was clearly prejudicial to Appellant and his conviction should be reversed.

GROUND OF ERROR NUMBER 4

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE AN EXTRANEOUS OFFENSE DURING THE GUILT AND INNOCENCE STAGE TO PROVE IDENTITY WHEN THE POSITIVE IDENTIFICATION OF APPELLANT AS THE PERSON WHO SHOT MR. BAKER WAS NEVER DISCREDITED OR CHALLENGED.

As Theresa Ann Minor began to testify, Appellant approached the bench with an objection, and the trial court retired the jury for a hearing, Appellant objected to the proposed introduction of an extraneous offense involving Appellant shooting a pistol into a house on the ground that it was an inadmissible extra offense since there had been no attack in the positive identification of the Defendant already made by Officer McCammon (See R.2610).

Indeed, there was no Cross-examination designed to impeach McCammon on a theory of mistaken identity. It is clear that the prosecutor was offering the extraneous offense in the theory of identity.

MR. GRAHAM: The State depends at this time on one witness' identification, nothing else to connect the Defendant to the crime other than this one witness' identification of Officer McCammon. And the State, through this witness, would prove that two days earlier the Defendant was seen firing a gun into a house, that a slug was recovered by the police from the house, taken and identified by firearms ballistics experts matching the bullet that came or the bullets that came from the body of the deceased, which proves that the Defendant was firing a weapon, the same weapon which killed the deceased two days before the shooting. That's the purpose of the testimony. (R.2739 lines 9-21).

Appellant timely and forcefully objected to the prejudicial introduction of the extraneous offense.

MR. BLAINE: Your honor, I have reason to believe, as I say, that the State intends to prove an extraneous offense through this witness in an effort to prove identity. I understand under certain circumstances extraneous offenses are admissible for the purpose of proving identity, but the identity in this case, his proof it has not been attacked or questioned. This man has been unequivocally identified. There's no issue of identity. Proving some extraneous offense is more prejudicial than it would be beneficial to this jury. It's harmful, very prejudicial to this Defendant, to prove some extraneous offense. There's been no attack upon the positive identification already made by the witnesses. Under the circumstances, it would not be admissible before the jury at this time. (R.2738 lines 19--2739 line 8)

Although there had been no attack upon the positive identification of Appellant as the person who shot the Officer, and although the identifying witness' testimony had not been discredited in any way, the trial Court, over Appellant's clear objection and legal argument (See R.2738 line 19--R.2739 line 8; R.2739 line 24--R.2740 line 10; R.2741 lines 5-11; R.2742 lines 10-22), admitted the witness' testimony for the purpose stated by the prosecutor, that is, to establish identity. (R.2742 lines 23-25).

The trial court resumed testimony before the jury which established that a few days before the instant situation, Appellant was seen with a pistol firing at the witness' next door neighbor's

house (R.2745--2746). Later testimony, proved that the gun used by Appellant to fire into that house was the same weapon that fired the fatal shots in the instant case. Appellant object to State's Exhibit 46 (1 casing and 1 live round recovered on Priest Street) and State's Exhibit 27 (1 bullet taken from State's Exhibit 46) on the ground that they involved an extraneous offense. (R.2769).

A fundamental rule in that one accused of a crime is to be tried for the offense charged and for no other, and evidence that one is a criminal, generally, is inadmissible. Albrecht v. State, 486 S.W.2d 97 (Tex.Crim.App. 1972). There are well known exceptions, such as: (1) when it is part of the res gestae; (2) to prove identity; (3) to rebut the defensive theory; (4) to prove guilty knowledg; (5) to prove intent; (6) to prove motive; (7) to prove system; or (8) in a circumstantial case.

The theory of admissibility urged by the prosecution was to show identity. The rule is that when the identification of the accused is not sufficient, or when the state lacks direct evidence on the issue of identification, the prosecution may establish that identification by showing extraneous offenses. Ford v. State, 484 S.W.2d 727 (Tex.Crim.App 1972). If, however, the evidence presented by the prosecution leaves no doubt as to the identy of the Defendant, evidence concerning Defendant's commission of other crimes is inadmissible on the issue. Jones v. State, 481 S.W.2d 900 (Tex.Crim.App. 1972).

The mere cross-examination of a witness who has identified positively the defendant will not open the door to an extraneous offense. Caldwell v. State, 477 S.W.2d 877 (Tex.Crim.App. 1972).

McCarron identified Appellant in Court as the person he and Charles Baker arrested, and who shot Charles Baker.

Q. Do you see the man in the courtroom we were talking about?

A. Yes, sir.

Q. Point him out, please.

A. Sitting over there in the blue shirt.

Mr. GRAHAM: May the record reflect the officer has pointed out the Defendant, Your Honor.

THE COURT: Yes, sir.

Q. Are you absolutely certain of that?

A. Yes, sir. (R. 2610 lines 12-21)

Throughout the testimony, McCarron spoke of Appellant as the one involved in the shooting on August 16, 1979. R. 2612 lines 1-25; R. 2614 lines 4-5; R. 2614 lines 20-23; R. 2615 lines 2-4; R. 2616 lines 13-15; R. 2616 lines 22-25; R. 2617 lines 6-8; R. 2618 lines 5-6, 13-16; R. 2618 line 25 - R. 2619 line 2.

The witness testified he identified Appellant out of a line-up as the man who shot Mr. Baker. R. 2630 lines 11-13; R. 2630 lines 22--R.2631 line 5.

Ironically, when it came time for closing the prosecutor argued: "And that's undisputed is it not that Charles Bass killed Charles Baker." (R. 2872 lines 5-6).

The identification of Appellant as the person who shot Mr. Baker was never challenged by the defense. The extraneous offense was inadmissible, and for this error, the Court should grant Appellant a new trial.

GROUND OF ERROR NO. 5

THE CONVICTION SHOULD BE REVERSED IN THAT PROSPECTIVE JUROR MARIAN HALL WAS IMPROPERLY EXCLUDED UNDER THE RATIONALE OF ADAMS V. TEXAS __ U.S. __ (1980) and WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968)

GROUND OF ERROR NO. 6

THE CONVICTION SHOULD BE REVERSED IN THAT PROSPECTIVE JUROR MILDRED SPENSLY WAS IMPROPERLY EXCLUDED UNDER THE RATIONALE OF ADAMS V. TEXAS __ U.S. __ (1980) and WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968)

Statement of Facts Relative to Prospective Juror Marian Hall

Her entire voir dire is found at R. 2416-2454. The relevant testimony showing her qualifications under Adams v. Texas __ U.S. __ 65 L.Ed.2d 581, 100 S.Ct. __ (1980) and Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968) is as follows:

Q . . . Do you have any objections, conscientious objections to the infliction of death as a punishment for crime in a proper case?

A. No, I guess not. (R. 2417 lines 13-16)

. . .

Q. Well, basically, I'm trying to find out, first of all, do you agree with the death penalty or not?

A. I can't say. I don't think -- I have to either say yes or no?

Q. Yes.

A. No. But, on the other hand, I do think I could carry out the law. If that is the law, if I were on the jury, I would carry it out. R. 2423 lines 7-14

. . .

A. I can't say I object, but I could give somebody the death penalty if there's no other way to make sure they are not back on the streets. (R. 2426 lines 9-11)

. . .

A. I don't believe in the death penalty. I would have to rationalize that I am not giving it to him, that I am not giving it to him, the State is. (R. 2436 lines 22-24)

The State challenged on the basis of Penal Code Section 12.31(b), and the trial judge sustained the challenge (R. 2444, 2450-2451).

Statement of Facts Relative to Prospective Juror Mildred Spensley

Her entire voir dire examination is found at R. 2153-2167. The relevant testimony showing her qualifications under Adams v. Texas and Witherspoon v. Illinois, supra, is as follows:

. . .

Q. Now, do you have any conscientious objections to the assessment of death as a punishment for crime in a proper case?

A. Well, . . . I have maintained many times that in certain circumstances I believed it should occur. (R. 2154 lines 5-10)

. . .

Q. You said that you -- well, I was curious as to when you thought the death penalty should occur. You mentioned in some cases you thought it was proper.

A. I have thought about it and discussed. I do think it's proper in certain cases. (R. 2157 lines 9-15)

. . .

Q. Do you feel like you have to answer one of those questions no to make sure he got life imprisonment instead of death, regardless of how much evidence the State showed you?

A. No, I don't feel that I have to say no if I felt yes.

Q. Do you think you could vote for the death penalty, is that what you are saying?

A. I could vote for it, but I would be very unhappy probably the rest of my life. (R. 2162 line 21 - R. 2163 line 4)

. . .

The State challenged for cause (R. 2165), and the trial judge sustained the challenge (R. 2167).

Argument and Authority Under Grounds of Error Nos. 5 and 6

In Witherspoon, supra, the United States Supreme Court stated:

> ". . . we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."

In Adams v. Texas, supra, the United States Supreme Court held that Penal Code Section 12.31 (b) could not be used to exclude jurors on broader grounds than set out in Witherspoon.

Veniremen Ball and Spensley were qualified under Witherspoon. The trial judge erred in sustaining the State's challenge for cause. Even one improper sustaining of a challenge for cause means the death penalty cannot be imposed. See Davis v. Georgia 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339.

Counsel did not object to the court's ruling. A majority of this Court has held that the failure to object to the trial court sustaining the State's challenge for cause in a Witherspoon situation waives any error. See White v. State, No. 66,044 delivered January 21, 1981; Boulware v. State, 542 S.W.2d 677 (Tex.Crim.App. 1976); Russell v. State, 598 S.W.2d 677 (Tex.Crim.App. 1980); Hughes v. State, 562 S.W.2d 857 (Tex.Crim. App. 1978); Shippy v. State, 556 S.W.2d 246 (Tex.Crim.App. 1977).

For the errors stated under Grounds 5 and 6, appellant's conviction should be reversed, and the Court should reconsider the "waiver" theory as expressed in the opinions cited above. See Wigglesworth v. Ohio, 403 U.S. 947.

CONCLUSION AND PRAYER

WHEREFORE PREMISES CONSIDERED, Appellant prays that this honorable Court reverse his conviction herein and grant him a new trial.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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SUPREME COURT, U.S.

CHARLES WILLIAM BASS

Petitioner

vs.

CASE NO. 81-6205

STATE OF TEXAS

Respondent

PETITION TO PROCEED IN FORMA PAUPERIS

Petitioner, Charles William Bass, states to the Court that he is now, and has been for the past three (3) years, unemployed.

Petitioner is destitute and without funds, and makes this Petition in support of his Motion to Proceed In Forma Pauperis in the above captioned matter without prepayment of fees or costs, or giving security therefore. An Affidavit in support of this Petition has been filed herewith, and attached hereto.

WHEREFORE, Petitioner prays that he be allowed to proceed In Forma Pauperis, pursuant to 28 U.S. CA 1915.

Charles William Bass

CHARLES WILLIAM BASS
Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RECEIVED
FEB 10 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CHARLES WILLIAM BASS

Petitioner

vs. CASE NO. _____

STATE OF TEXAS

Respondent

AFFIDAVIT

STATE OF TEXAS)
) SS:
)

Affiant, Charles William Bass, states:

1. That he is an American citizen.

2. That he is the Petitioner in the above captioned Petition Action.

3. That he is unemployed and has been so for three (3) years.

4. That he is presently confined in the Texas State Prison at Huntsville, Texas.

5. That he has no property or assets.

6. That he is therefore destitute and without any funds.

7. That he has had appointed counsel at trial and state court appeals.

8. Therefore, he requests the Court to allow him to proceed In Forma Pauperis.

Further the Affiant sayeth naught.

Charles William Bass
CHARLES WILLIAM BASS

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed this the 30 day of January, 1982.

Charles William Bass
Charles William Bass

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SUPREME COURT, U.S.

NO. 81-6205

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

CHARLES WILLIAM BASS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

I. Should this Court Review a Matter Which Was Not Properly Raised or Decided in the Court Below?

II. Does the Decision of the Court Below that Evidence Admitted in Violation of State Evidentiary Rules Was Harmless Present a Federal Constitutional Question?

III. Was Petitioner Denied an Impartial Jury by the Service of Juror Marilyn Turner?

IV. Should this Court Review a Matter to Which the State Appellate Court found that Petitioner made a Procedural Default under State Law?

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NO. 81-6205

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

CHARLES WILLIAM BASS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLES JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition:

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, delivered October 23, 1981, is reported at 622 S.W.2d 101 (Tex.Crim.App. 1981) and is attached to the petition as Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner bases his claims upon the Sixth and Fourteenth Amendments to the United States Constitution.

Also involved is Article 36.29, V.A.C.C.P.

STATEMENT OF FACTS

Petitioner was tried in May, 1980, for the 1979 murder in Houston, Texas, of Charles Baker, a peace officer acting in the lawful discharge of his duties. See, Sec. 19.03(a)(1), V.T.C.A. Penal Code. The record reflects that shortly after he committed an aggravated robbery, Petitioner was stopped by the deceased and another peace officer, who were attempting to serve arrest warrants. Petitioner struggled with the deceased, shot him twice with a pistol hidden in his pants, and fled to Kentucky. After fighting extradition proceedings for almost six months, Petitioner was returned to Texas. Although at trial Petitioner testified in his own behalf and claimed that he acted in self-defense, on May 29, 1980, the jury found him guilty of the capital offense. On May 30, 1980, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, V.A.C.C.P. Accordingly, punishment was assessed at death.

The conviction was affirmed on September 23, 1981. On October 5, 1981, Petitioner's attorney timely filed a motion for leave to file a motion for rehearing. On October 9, 1981, sixteen days after the court's decision was handed down, Petitioner's present counsel, acting as amicus curiae, filed a motion for leave to file a motion for rehearing. On October 28, 1981, the motions for leave were denied.

SUMMARY OF THE ARGUMENT

There are no special and important reasons to review this case. Petitioner's contention that the trial court erred in denying his last-minute motion for continuance was not properly raised in the court below. As such, this issue was not reviewed by that court and review in this Court should be precluded.

Petitioner's complaint about the admission at trial of an extraneous offense presents no federal question, since it is grounded on the application of state evidentiary rules. Further, as the court below found from a review of the entire record, any error in the admission of this evidence was harmless beyond a reasonable doubt.

Petitioner has failed to show constitutional error in his contention that the trial court abused its discretion in refusing to hold disqualified a juror who had been the victim of a crime subsequent to her selection. Further, when Petitioner was given the opportunity to agree to the juror's exclusion, he refused to do so. This ground fails to raise a constitutional question.

This Court should refuse to consider Petitioner's contentions that two veniremen were erroneously excluded from his capital venire. As Petitioner correctly states, he failed to comply with the State's contemporaneous objection requirement at trial, in that he failed to make any objections to the exclusion of these veniremen until his direct appeal. As such, the state appellate court found that Petitioner had waived any complaints. Thus, this Court should decline to review these grounds.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reasons in this case and none exist.

II.

THE COURT SHOULD REFUSE TO CONSIDER A MATTER WHICH WAS NOT PROPERLY RAISED OR DECIDED IN THE COURT BELOW

Petitioner's contention that the trial court erred in denying his pro se motion for continuance and request to change counsel filed two days before trial was not properly presented in the court below. This contention was first made by amicus curiae in his untimely filed motion for leave to file a motion for rehearing.

The former Rules of the Court of Criminal Appeals, Rule 11, effective at the time of decision in Petitioner's case, provided that:

> Motions for rehearing may not be filed as a matter of right. Any party desiring a rehearing of any case which is initially determined by the Court En Banc must, within 15 days after the opinion is handed down, present to the Clerk a motion for rehearing. . . accompanied with a motion for leave to file. . . If as many as five members of the Court are of the tentative opinion that the motion for a rehearing should be granted in whole or in part, the motion for leave to file will be granted. . . Otherwise the motion for leave to file will be denied, and the motion for a rehearing will not be filed.

The records below are clear that the motion for leave to file a petition for rehearing by the amicus curiae was not timely filed, as more than fifteen days had elapsed since the date of decision. It is equally clear that, since the motion for leave to file was denied, the motion for rehearing was not filed or reviewed by the court below.

This Court consistently has declined to review matters which were not raised and decided in the court below. Tacon v. Arizona, 410 U.S. 351 (1973); Cardinale v. Louisiana, 394 U.S. 437 (1969). Where discussion of an issue is omitted from the lower court's opinion, as here, this Court will assume that the issue was not properly presented to that court for review, unless the aggrieved party can show otherwise. Street v. New York, 394 U.S. 582 (1969); see also, In re Lamkin, 355 U.S. 59 (1957).

In the instant case, because Petitioner failed to comply with state procedural law in presenting this contention to the appellate court, the claim was not reviewed. Accordingly, this Court should decline to review this ground not decided in the lower court.

III.

THE DECISION OF THE COURT BELOW THAT EVIDENCE ADMITTED IN VIOLATION OF STATE EVIDENTIARY RULES WAS HARMLESS IS BASED UPON NONFEDERAL GROUNDS AND PRESENTS NO CONSTITUTIONAL QUESTION

The Court of Criminal Appeals found that the evidence that Petitioner had once recklessly fired a pistol before he committed the capital offense was admitted in violation of state evidentiary rules. 622 S.W.2d at 104. No federal constitutional question was urged in the court below, and none was decided by that court.

This Court has declined to review matters of state law or judgments of state courts which rest on independent state grounds. Henry v. Mississippi, 379 U.S. 443 (1965); Rice v. Olson, 324 U.S. 786 (1945). Clearly, Petitioner is challenging the application of state evidentiary rules, which presents no federal constitutional questions.

Even if a constitutional question were presented, the state court, in reviewing Petitioner's complaint about the admission of evidence that he once recklessly fired a pistol, stated:

> In the instant case, evidence of appellant's guilt was overwhelming. McCammon saw appellant and Baker struggling before Baker was shot. Appellant admitted that he

> shot Baker when the officer was directly behind him. The medical examiner testified that the skin contact wound to the victim's stomach would have resulted in death within three to five minutes. The extraneous offenses of the aggravated robbery at Shirlee's Lounge and the attempted capital murder of McCammon were admitted without objection. Both offenses are first degree felonies. While testifying, appellant stated that he had been arrested on eight or nine previous occasions.
>
> We conclude that in view of the other evidence presented at trial, there is not a reasonable probability that the complained of misdemeanor extraneous offense might have contributed to appellant's conviction or had any effect upon punishment assessed. No reversible error is shown.

622 S.W.2d at 104. Thus, in light of the entire record and other evidence adduced at trial, it is clear that the admission of this evidence was harmless beyond a reasonable doubt. See, Chapman v. California, 384 U.S. 18, 87 S.Ct. 824 (1967).

IV.

PETITIONER WAS NOT DENIED HIS RIGHT TO AN IMPARTIAL JURY BY THE SERVICE OF JUROR MARILYN TURNER

The record reflects that well after the completion of the lengthy jury selection procedures, one juror, Marilyn Turner, approached the trial court and reported that she recently had been the victim of a crime and was concerned about her impartiality (SF 2452). A hearing was held by the court, at which time Turner stated that although she was upset and had trouble concentrating, she was "willing to do [her] civic duty" and would do her best to follow the court's instructions (SF 2583, 2584, 2591).

Petitioner objected to the discharge of this juror and selection of another unless he were given a number of additional peremptory strikes equal to those which the state had remaining at the conclusion of voir dire proceedings (SF 2585-2589). Thus, when given the opportunity to agree to her dismissal, Petitioner declined to do so.

The Court of Criminal Appeals found that the issue was whether the trial court abused its discretion in declining to hold Turner "disabled" from service pursuant to Article 36.29, V.A.C.C.P., and stated:

> In the instant case, Turner was understandably upset at the time of the hearing. She indicated that she was having difficulty in concentrating and was at times nauseous. On the other hand, she stated that she was willing to do her "civic duty" and would do "the best [she] could" while serving on the jury. Appellant did not question Turner at the time he sought to have the court discharge her as disabled. Further, there was no evidence offered at the hearing on appellant's motion for new trial with regard to the effect, if any, which the incident had on Turner's verdict at either phase of the trial or any difficulty she may have had as serving as a juror.
>
> In determining whether the court abused its discretion in failing to discharge Turner as disabled, this Court has been provided with nothing more than a cold record. However, at the time of the hearing, the trial court, in determining the issue, had the opportunity to observe Turner's demeanor and listen to the tone of her voice. Based upon this record, we cannot conclude the court abused its discretion in refusing to discharge Turner as disabled from sitting on the jury.

622 S.W.2d 101. This court should decline to review the trial court's exercise of discretion.

V.

THIS COURT SHOULD REFUSE TO CONSIDER A MATTER TO WHICH THE STATE APPELLATE COURT FOUND PETITIONER HAD MADE A PROCEDURAL DEFAULT UNDER STATE LAW

Petitioner contends that veniremen Mildred Spensley and Marian Hall were excluded for cause in violation of the doctrine of Witherspoon v. Illinois, 391 U.S. 510 (1968). When these contentions were presented to the state appellate court, that court held that Petitioner had waived review of these grounds, as he failed to make contemporaneous objection on those grounds at trial as was required by state procedural law in effect at the time of Petitioner's trial. See, Boulware v. State, 542 S.W.2d 677 (Tex.Crim.App. 1976), cert. denied, 430 U.S. 959 (1977).

This Court consistently has declined to review matters to which no proper objection was made at trial in compliance with state procedural requirements. The failure of a defendant to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court. Michigan v. Tyler, 436 U.S. 499 n.7 (1978). That the state has a legitimate interest in requiring the parties to apprise the trial court of their grounds for complaint is well settled. See, e.g., Wainwright v. Sykes, 433 U.S. 72 (1977); Estelle v. Williams, 425 U.S. 501 (1976); Davis v. United States, 411 U.S. 233 (1973). The state's legitimate interest in this procedural rule is evident in the instant case where, if Petitioner believed that the doctrine of Witherspoon was violated or he did not want the veniremen excluded, he should have apprised the trial court, giving that court an opportunity to remedy any defect before the completion of the entire voir dire and trial on the merits. Having failed to do so, Petitioner is precluded from review of this ground.

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that the petition for certiorari be denied.

Respectfully submitted,

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